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# IN THE
# COURT OF APPEALS OF INDIANA

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| ARVIN CRUITE, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 03A05-0612-CR-743 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause Nos. 03D01-9809-DF-965, 03D01-9811-CF-1154 & 03D01-0411-PC-1856

**August 29, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## Case Summary

Arvin Cruite ("Cruite") brings this belated appeal of his cumulative thirty-one-year sentence consisting of consecutive maximum sentences of twenty years for dealing in cocaine as a Class B felony, eight years for fraud on a financial institution, a Class C felony, and three years for auto theft as a Class D felony. Cruite committed these crimes in 1998 and was sentenced in 1999. On appeal, Cruite argues that several of the aggravating circumstances relied upon by the trial court are invalid under *Blakely v. Washington*, 542 U.S. 296 (2004). He also challenges several of the aggravating circumstances on non-*Blakely* grounds and contends that the trial court abused its discretion by failing to find his guilty plea as a mitigating circumstance. We reject Cruite's *Blakely* claims in light of the Indiana Supreme Court's recent holding, in *Gutermuth v. State*, 868 N.E.2d 427 (Ind. 2007), that belated appeals of sentences entered before *Blakely* are not subject to the holding in that case. As to Cruite's non-*Blakely* claims, we conclude that the trial court abused its discretion with regard to two of the four aggravating circumstances and by failing to find Cruite's guilty plea as a mitigating circumstance. Therefore, we remand this cause to the trial court with instructions to order consecutive sentences of thirteen years for dealing in cocaine, five years for fraud on a financial institution, and two years for auto theft, for a total executed sentence of twenty years.

## Facts and Procedural History

On June 18, 1998, the State charged Cruite with two counts of Fraud on a Financial Institution, a Class C felony,[1] under cause number 03D01-9806-CF-588 ("Cause No. 588"). The charging information alleged that in May 1998, Cruite executed a scheme by which he made false deposits into the Centra Credit Union bank accounts of Misty Parker and Melanie Shook by placing empty envelopes into ATM machines then made withdrawals from those accounts using the women's ATM cards and pin numbers.

On September 23, 1998, the State charged Cruite with Auto Theft as a Class D felony[2] under cause number 03D01-9809-DF-965 ("Cause No. 965"). The charging information alleged that on July 3, 1998, while Cruite was free on bond after the initial hearing in Cause No. 588, he took a vehicle from Budget Car Sales in Columbus, Indiana, for a test drive, went to a Lowes store and had a copy of the key made, and later used the key to steal the vehicle.

On November 18, 1998, the State charged Cruite with two counts of Dealing in Cocaine as a Class A felony[3] under cause number 03D01-9811-CF-1154 ("Cause No. 1154"). The charging information alleged that on both June 2 and June 3, 1998, Cruite knowingly or intentionally delivered cocaine within 1000 feet of a public park in Columbus, Indiana.

Pursuant to a plea agreement, Cruite pled guilty to one count of fraud on a financial institution, a Class C felony, under Cause No. 588, auto theft as a Class D

[1] Ind. Code § 35-43-5-8.

[2] Ind. Code § 35-43-4-2.5.

[3] Ind. Code § 35-48-4-1.

felony under Cause No. 965, and one count of dealing in cocaine as a Class B felony under Cause No. 1154 (a lesser included offense of one of the original charges of dealing in cocaine as a Class A felony). In return, the State dismissed the other fraud on a financial institution charge under Cause No. 588 and the other dealing in cocaine charge under Cause No. 1154, along with two Class C felony counts of fraud on a financial institution under the unrelated cause number 03D01-9811-CF-1169 ("Cause No. 1169"). Sentencing was left to the discretion of the trial court.

On January 5, 1999, the trial court held a sentencing hearing. The trial court did not find any mitigating circumstances but found the following aggravating circumstances: (1) the high risk that Cruite would commit another crime; (2) the nature and circumstances of Cruite's crimes; (3) Cruite's history of criminal and delinquent activity; and (4) the imposition of a reduced sentence would depreciate the seriousness of Cruite's crimes.[4] The court sentenced Cruite to the maximum sentence of twenty years for dealing in cocaine as a Class B felony, the maximum sentence of eight years for fraud on a financial institution, a Class C felony, and the maximum sentence of three years for

[4] Cruite suggests that the trial court found Cruite's "attitude" to be an aggravating circumstance. Appellant's Br. p. 21. It is true that the trial court spent a few minutes during the sentencing hearing discussing Cruite's attitude and lifestyle. *See* Tr. p. 84-86. However, the trial court never found Cruite's attitude as an aggravating circumstance. Therefore, we need not separately address this argument.

The State, on the other hand, "perceives" that the trial court found three additional aggravating circumstances: (1) that Cruite's cocaine conviction was actually based on a Class A felony; (2) Cruite's prior probation and other opportunities to reform; and (3) Cruite committed several of the present crimes while free on bond. Appellee's Br. p. 8-9. However, as will be seen below, the trial court discussed the fact that Cruite's Class B felony dealing in cocaine was originally charged as a Class A felony as part of its discussion of the nature and circumstances of the crime. Furthermore, Cruite's prior probation, and the violation thereof, are related to the history of criminal activity aggravator. Finally, the fact that Cruite committed some of the present crimes while free on bond is relevant to the risk of future crimes aggravators. Therefore, while the trial court's oral sentencing statement is not entirely clear, we cannot agree with the State that the trial court found seven separate aggravators.

auto theft as a Class D felony and ordered all of the sentences to run consecutively, for a total executed sentence of thirty-one years. Cruite now brings this belated appeal.[5]

## Discussion and Decision

On appeal, Cruite argues that several of the aggravating circumstances relied upon by the trial court are invalid under *Blakely*. He also challenges several of the aggravating circumstances on non-*Blakely* grounds and contends that the trial court abused its discretion by failing to find his guilty plea as a mitigating circumstance.[6]

### I. *Blakely*

Cruite's main contention on appeal is that the trial court's finding of several aggravating circumstances violated his rights under *Blakely*, in which the United States Supreme Court stated, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Cruite contends that his sentence violates *Blakely* because several of the aggravators identified by the trial court were not "derived from prior convictions, admitted by Cruite, admitted as part of his plea, or proven to a jury

[5] Cruite's journey to this belated appeal is detailed in *Cruite v. State*, 853 N.E.2d 487 (Ind. Ct. App. 2006), *trans. denied*.

[6] Cruite also argues that his sentence is inappropriate in light of the nature of his offenses and his character under Indiana Appellate Rule 7(B). However, because we reverse Cruite's sentence based on the trial court's abuse of discretion in finding aggravating and mitigating circumstances, we need not address Cruite's inappropriateness argument.

We note that because Cruite committed his offenses in 1998, we operate under the former presumptive sentencing scheme rather than the current advisory scheme, which did not take effect until April 25, 2005. *See Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (explaining that "the long-standing rule" is that "the sentencing statute in effect at the time a crime is committed governs the sentence for that crime").

beyond a reasonable doubt." Appellant's Br. p. 8. In light of recent developments, we conclude that Cruite is not entitled to have his sentence reviewed under *Blakely*.

Cruite's claims come to us by way of a belated appeal. Cruite was sentenced in January 1999, more than five years before *Blakely* was decided, and he received permission to file this belated appeal in August 2006. Unfortunately for Cruite, on June 20, 2007, more than three months after briefing in this case was complete, the Indiana Supreme Court rejected Cruite's position in *Gutermuth*, where it stated:

> We hold that this belated appeal of a sentence entered before a new constitutional rule of criminal procedure was announced is not governed by the new rule. Specifically, belated appeals of sentences entered before *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) are not subject to the holding in that case.

868 N.E.2d at 428. In accordance with our Supreme Court's holding, we need not address Cruite's *Blakely* claims.

## II. Aggravators and Mitigators

Cruite also challenges the aggravating circumstances relied upon by the trial court on non-*Blakely* grounds and contends that the trial court abused its discretion by failing to find his guilty plea as a mitigating circumstance. Initially, we note that sentencing decisions are generally within the discretion of the trial court and will only be reversed upon a showing of an abuse of discretion. *Marshall v. State*, 832 N.E.2d 615, 623 (Ind. Ct. App. 2005), *trans. denied*.

Cruite first argues that the trial court abused its discretion by finding as an aggravating circumstance a high risk that Cruite would commit another crime. We disagree. This aggravator is supported by the fact that Cruite committed the auto theft

charged in Cause No. 965 approximately two weeks after he was charged with two counts of fraud on a financial institution, a Class C felony, under Cause No. 588 and while he was free on bond for those charges. As the trial court said to Cruite, "Well you went to jail and you didn't do anything to slow down what you were doing." Tr. p. 81. Furthermore, Cruite admitted during the sentencing hearing that he had been on probation before and had violated that probation. These facts support the trial court's finding that there was a high risk that Cruite would commit another crime.

Cruite next asserts that the trial court abused its discretion by identifying the nature and circumstances of Cruite's crimes as an aggravating circumstance. On this point, we must agree with Cruite. In identifying this aggravator, the trial court stated, "[T]he thing that probably is most important here is that you were charged with a Class A felony, Dealing in Cocaine. . . . And that's what you actually did. You actually committed a Class A felony[.]" *Id*. at 83-84. But, as we held in *Conwell v. State*,

> [W]hen a defendant pleads guilty to an included offense, the element(s) distinguishing it from the greater offense . . . may not be used as an aggravating circumstance to enhance the sentence. The trial court is entitled to refuse to accept the plea to the included offense, but it may not attempt to sentence as if the defendant had pled to the greater offense by using the distinguishing element(s) as an aggravating factor.

542 N.E.2d 1024, 1025 (Ind. Ct. App. 1989); *see also Carlson v. State*, 716 N.E.2d 469, 472-73 (Ind. Ct. App. 1999). Here, the trial court abused its discretion by finding as an aggravating circumstance the element distinguishing the lesser included offense of dealing in cocaine as a Class B felony from the greater offense of dealing in cocaine as a Class A felony, *i.e.*, dealing within 1000 feet of a public park.

Cruite further argues that the trial court assigned too much aggravating weight to his criminal history. The weight of an individual's criminal history is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability. *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006). Cruite has two adult convictions in Kentucky. In 1983, he was convicted of knowingly receiving stolen property and placed on probation for five years. He violated his probation within nine months and was sentenced to one year in prison. After being released, he was convicted of second degree robbery in 1986 and sentenced to ten years in prison. Though these convictions are relatively distant, having occurred fifteen and twelve years before the current offenses, respectively, they are also fairly serious, calling for sentences of five and ten years, and quite similar to two of the current offenses—fraud on a financial institution and auto theft—in that they involve the taking of property. Cruite's probation violation is also a relevant part of his criminal history. The trial court did not abuse its discretion as to this aggravator.

Next, Cruite maintains that the trial court abused its discretion by finding as an aggravating circumstance that imposition of a reduced sentence would depreciate the seriousness of Cruite's crimes. Here, again, we must agree with Cruite. The "depreciate the seriousness" aggravator is appropriate only where the trial court is considering a reduced sentence. *Hawkins v. State*, 748 N.E.2d 362, 363 (Ind. 2002), *reh'g denied*. There is no indication that the trial court was considering a reduced sentence in this case.

Finally, Cruite contends that the trial court abused its discretion in failing to find his guilty plea as a mitigating circumstance. We agree. "[A] guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea[.]" *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), *trans. denied*. Here, Cruite did receive a substantial benefit in return for his guilty plea: the State agreed to dismiss three counts of fraud on a financial institution, a Class C felony, under Cause Nos. 588 and 1169. Furthermore, under Cause No. 1154, the State dismissed one count of dealing in cocaine as a Class A felony and allowed Cruite to plead guilty to the lesser included offense of dealing in cocaine as a Class B felony as to the other count. Nonetheless, "a defendant who pleads guilty deserves to have *some* mitigating weight extended to the guilty plea in return." *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005) (emphasis added). Therefore, the trial court abused its discretion in failing to at least acknowledge that there was a guilty plea.

To summarize, we conclude that the trial court abused its discretion in finding two of the four aggravating circumstances: the nature and circumstances of the crimes and that the imposition of a reduced sentence would depreciate the seriousness of the crimes. "When one or more aggravating circumstances cited by the trial court are invalid, the court on appeal must decide whether the remaining circumstance or circumstances are sufficient to support the sentence imposed." *Id*. "Where we find an irregularity in a trial court's sentencing decision, we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances

independently at the appellate level." *Id*. We elect the last option. Weighing the two remaining aggravating circumstances—the risk that Cruite will commit another crime and Cruite's criminal history—against the one mitigating circumstance—Cruite's guilty plea—we conclude that maximum consecutive sentences are inappropriate. We therefore remand this cause to the trial court with instructions to order consecutive sentences of thirteen years for dealing in cocaine as a Class B felony, five years for fraud on a financial institution, a Class C felony, and two years for auto theft as a Class D felony, for a total executed sentence of twenty years.

Reversed and remanded.

ROBB, J., and BRADFORD, J., concur.